U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: AUG 30 2013 Office: TEXAS SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. In response to the petitioner's motion to reopen and reconsider, the AAO determined that the appeal should remain dismissed and the petition should remain denied. The petitioner has filed a second motion to reopen and reconsider. The petitioner's motion will be granted as a motion to reconsider. The AAO's decisions of April 25, 2012 and June 25, 2013 are affirmed. The petition remains denied.

The petitioner, [redacted] is a computer consulting and software business. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had failed to establish that it had the continuing ability to pay the beneficiary the proffered wage from the priority date of December 9, 2004, onward.[1] The director denied the petition on April 22, 2008.

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[1] The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall circumstances affecting the petitioning business will be

considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated

The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States. *See also* 8 C.F.R. § 204.5(k)(1).

> that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

As an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (USCIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible readily available resource out of which the proffered wage may be paid. A petitioner's year-end current assets and current liabilities are generally shown on line(s) 1 through 6 and line(s) 16 through 18 of Schedule L of a corporate return. If the petitioner's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner must also establish that the beneficiary satisfied all of the educational, training, experience and any other requirements of the offered position by the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

On April 25, 2012, the AAO upheld the director's decision and dismissed the appeal. In this decision, the AAO noted that there was no evidence that the petitioner had employed the beneficiary during the 2004 to June 2008 period of time, although there was evidence that an affiliated but separate company had employed him. The affiliated company had a different federal employment identification number (FEIN) than the petitioner. As previously indicated by the AAO in its prior decisions, and pursuant to the regulation at 20 C.F.R. § 656.3, "An employer must possess a valid Federal Employer Identification Number (FEIN)." If the two companies have separate tax identification numbers, they would considered to be separate employers. In this case, regardless of any affiliation, tax returns and W-2 informaton from business entities with a separate FEIN will not be considered in reviewing the petitioner's ability to pay the proffered wage because it represents separate entities. As noted in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

In its prior decisions on appeal and on motion, the AAO observed that the petitioner merged into its affiliated company, "Objectsoft Group, Inc."[2] in June 2008. Therefore, the petitioner's evidence of its own ability to pay the proffered wage of $74,672 from the priority date of December 9, 2004 until June 2008 (date of merger) would be only considered and the financial resources of its affiliate would be considered from June 2008 date onward until the next merger. The AAO found that the petitioner demonstrated its ability to pay the proffered wage to the instant beneficiary by Objectsoft Group, Inc. after the June 2008 merger and for 2009. To the extent the AAO found the petitioner's ability to pay the instant beneficiary in 2010, the AAO withdraws that finding as the record does not contain a federal tax return, audited financial statement or annual reports for 2010 for No positive finding as to this

[2] As noted in the AAO's decision on the petitioner's first motion to reopen and reconsider, the record indicates that the petitioner merged with ' ' as of January 2007, however the petitioner did not provide any evidence to demonstrate that ' paid wages to the beneficiary or that it had the financial ability (net income or net current assets) to pay the proffered wage between January 2007 and June 2008. As stated above, evidence in the record also suggests that effective on January 1, 2011.

entity's ability to pay the proffered wage in this year can be made without such evidence being part of this record of proceedings. *See* 8 C.F.R. § 204.5(g)(2).[3]

Another merger occurred with "3i Infotech, Inc." effective on January 1, 2011. Although the record contains an Information Return (Schedule 5472) for this entity, which covers the period from April 1, 2010 to March 31, 2011 and suggests the ability to pay the instant beneficiary based on its overall size, the documentation does not show net income or net current assets for this period or for the year of 2011, so to the extent any determination can be made as to the ability to pay the instant beneficiary in 2011, it is premature and must be qualified by the limitations of the evidence, which does not conclusively establish the ability to pay the instant beneficiary for 2011. As stated in the prior AAO decisions, the petitioner had not established its continuing ability to pay the proffered wage in 2004, 2005, 2006, 2007 and from January through June 2008, after examining payment of any wages to the beneficiary by the petitioner from the priority date until June 2008, the net income and net current assets as shown on the petitioner's federal tax returns for 2004, 2005, 2006 and 2007, and any factors supporting approval pursuant to *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). As noted in the AAO's prior decision on motion, the petitioner did not submit any federal tax return for 2008.[4] The AAO also noted that the petitioner had filed multiple immigrant and nonimmigrant petitions (172 total with 17 Form I-140s) since its establishment and had not addressed this issue.

The petitioner has submitted a second motion to reopen and motion to reconsider asserting that the AAO should find that the petitioner has established the continuing ability to pay the proffered wage. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. 8 C.F.R. § 103.5(a)(3). The AAO will accept the motion as a motion to reconsider.

Counsel asserts that the petitioner has established its ability to pay the proffered wage by a preponderance of the evidence and that it has submitted sufficient evidence to merit an approval pursuant to *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The AAO concurs with counsel's identification of the burden of proof, however it remains that in visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of*

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[3]Further, no W-2 for 2010, reflecting payment of wages to the beneficiary has been submitted.

[4]Moreover, for 2007, the petitioner submitted copies of two tax returns filed. The first covers the first ten months of the year. The second covers November and December 2007 and reflects that the petitioner changed its status from an S corporation to a C corporation. Regardless, the two month tax return covering November and December reflects -$17,509 in net income (line 28) and -$32,617 in net current assets.

Martinez, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989). The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that something to be proved is probably true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989).

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In this matter, while counsel emphasizes the petitioner's improved circumstances (based on successive mergers), and the offer as representing future employment, it remains that the petitioner's evidence failed to establish that the job offer was realistic as of the priority date based on the petitioner's failure to demonstrate its continuing ability to pay the proffered wage of $74,672 in 2004, 2005, 2006, 2007, or from January through June 2008. Additionally, the record lacks evidence that any successor-in-interest had the ability to pay the proffered wage to the beneficiary in 2010 or 2011 as stated above. The record indicates that the petitioner was formed only four months before it sought to petition a foreign worker. It failed to demonstrate any ability to pay the proffered wage to this beneficiary in the context of the multiple beneficiaries for which it had petitioned as raised in the AAO's April 25, 2012 decision and failed to establish that reputational or other factors analogous to the unique business circumstances that prevailed in *Sonegawa* would support approval in this proceeding. While a petitioner is not obligated to actually pay the proffered wage until the beneficiary obtains permanent resident status, as stated by current counsel, the job offer as described on the labor certification application submitted to the Department of Labor, must reflect the petitioner's ability to pay the proffered wage as of the

priority date, which, in this case was December 9, 2004.[5] *See* 8 C.F.R. § 204.5(g)(2). As determined in the AAO's previous decisions of April 25, 2012 and June 25, 2013, the petitioner failed to establish its continuing ability to pay the proffered wage from the priority date onward.

Pages 5 through 9 of the petitioner's second motion, which assert various analyses of the petitioner's ability to pay the proffered wage in each year, are *identical* to pages 2 through 6 of former counsel's previous motion. As such, the AAO will not repeat its decision of June 25, 2013 in this respect, which addresses these arguments. It is noted that for 2010, only the financial data for would be relevant. As also stated above, the record does not contain a federal tax return, audited financial statement or annual report for 2010 for this entity. With regard to 2011, counsel is correct that the financial data of is relevant, to the extent that the entire year of ability to pay information can be extrapolated from a Information Return of a 25% Foreign-Owned U.S. Corporation that ends on March 31, 2011, which it cannot. Moreover, counsel erroneously characterizes this entity's *total* assets as net current assets, which are different (S*ee* footnote 1 herein) and refers to a partnership return showing net income, which is not contained in this record of proceedings.

Based on the foregoing, the AAO does not find a sufficient basis to overturn its decisions of April 25, 2012 and June 25, 2013.

It is noted that on Part 2.F of the Form I-290B it designates the filing as a motion to reopen and a motion to reconsider a decision. Counsel added a statement on Part 3 that a brief would be sent separately within 30 days. Counsel cited no legal authority authorizing an extension of time in which to submit additional evidence in support of a motion. While the submission of additional

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[5]The AAO also notes that the labor certification states that location of the job offered is the address listed in item 6 of the Form ETA 750, which is No other alternate locations are listed. As the beneficiary's Wage and Tax Statements (W-2s) reflect that he has either lived in California or New York, and the petitioner has not been located in Maine since 2004, it raises a question as to whether this job offer has ever been valid in that location or continues to be valid for the location represented in the Form ETA 750. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(C)(2). Without more, it seems that the petitioner intends to employ the beneficiary outside the terms of the Form ETA 750. *See Sunoco Energy Development Company*, 17 I&N Dec. 283 (change of area of intended employment).

evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1), no analogous additional time is permitted for motions.[6]

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion to reconsider is granted. The AAO's decisions of April 25, 2012 and June 25, 2013 are affirmed. The petition remains denied.

[6] Moreover, the AAO has received nothing further to the record.